

***United States Court of Appeals
for the Second Circuit***



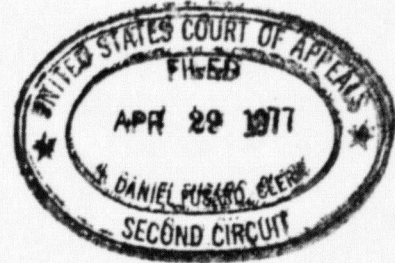
**BRIEF FOR
APPELLEE**

77-6032

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 77-6032



GWENDOLYN D. KING and NELLIE AVERY,
Plaintiffs-Appellees

vs.

HOUSING AUTHORITY OF THE CITY OF HARTFORD,
Defendant-Appellant

and J. CHARLES MOKRISKI, individually and in his capacity as Chairman of the Board of Commissioners of the Housing Authority of the City of Hartford, LIONEL DE JESUS, individually and in his capacity as Vice-Chairman of the Board of Commissioners of the Housing Authority of the City of Hartford, REV. CYRIL C. BURKE, individually and in his capacity as Treasurer of the Board of Commissioners of the Housing Authority of the City of Hartford, ALBERT E. COTTER, individually and in his capacity as Assistant Treasurer of the Housing Authority of the City of Hartford, ARTHUR L. ALSTON, individually and in his capacity as Assistant Treasurer of the Housing Authority of the City of Hartford, DANIEL LYONS, individually and in his capacity as Executive Director of the Housing Authority of the City of Hartford, and CARLA HILLS, individually and in her capacity as Secretary of the U.S. Department of Housing and Urban Development,

Defendants

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF CASES, STATUTES, REGULATIONS, CIRCULARS AND OTHER AUTHORITIES	ii
THE ISSUES PRESENTED FOR REVIEW	1
PRELIMINARY STATEMENT	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
ARGUMENT	
The Defendant HHA's Violation of HUD Regulations Concerning Lease Provisions and Grievance Procedures, Set Forth at 24 C.F.R. §866.1 et seq., Which Regulations are Reasonable, Consistent With the United States Housing Act of 1937, As Amended, And Thus Valid, Violates the Plaintiffs' Rights Under Said Housing Act	11
The Defendant HHA's Prosecution of Eviction Actions To Recover Possession of the Plaintiff Tenants' Premises Without Providing the Plaintiffs With Administrative Notice and an Opportunity to Be Heard Prior to Termination of Lease for Alleged Non-Payment of Rent Violates the Plaintiffs' Right to Due Process	19
The District Court Did Not Abuse Its Discretion in Granting the Preliminary Injunction	30
Conclusion	36

TABLE OF CASES, STATUTES, REGULATIONS
CIRCULARS AND OTHER AUTHORITIES

Cases Cited:	Page
<u>Borst v. Ruff</u> , 137 Conn. 359, 77 A.2d 343 (1951)	9
<u>Boske v. Comingore</u> , 177 U.S. 459 (1900)	12
<u>Brown and Williamson Tobacco Corp. v. Engman</u> , 527 F.2d 1115 (2nd Cir., 1975)	31, 30
<u>Brown v. Housing Authority of the City of Milwaukee</u> , 471 F.2d 63 (7th Cir., 1972)	14, 15, 17
<u>Caulder v. Durham Housing Authority</u> , 433 F.2d 998 (4th Cir., 1970)	25, 26, 29
<u>Chicago Housing Authority v. Harris</u> , 49 Ill. 2d 274, 275 N.E. 2d 353 (1971)	15
<u>Commissioner of Internal Revenue v. South Texas Lumber Co.</u> , 333 U.S. 496 (1947)	12
<u>Escalera v. New York City Housing Authority</u> , 425 F.2d 853 (2nd Cir.), cert. denied, 400 U.S. 853 (1970)	17, 19, 22, 23 24, 25
<u>Fawcus Machine Co. v. United States</u> 282 U.S. 375 (1931)	12
<u>Federal Housing Administration v. Darlington, Inc.</u> , 358 U.S. 84 (1958)	12
<u>Federal Trade Commission v. Mandel Bros. Inc.</u> , 359 U.S. 385 (1959)	12
<u>Gardner v. United States</u> , 239 F.2d 234 (5th Cir., 1956)	12
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970)	21, 22, 25, 27, 29, 35

<u>Halder v. Avis Rent-A-Car System, Inc.,</u> 541 F.2d 130 (2nd Cir., 1976)	31, 34
<u>Housing Authority of the City of</u> <u>Omaha v. United States</u> , 468 F.2d 1 (8th Cir., 1972)	15
<u>Lindsey v. Normet</u> , 405 U.S. 56 (1972)	22
<u>Mathews v. Eldridge</u> , ____ U.S. ____, 96 S. Ct. 893 (1976)	19, 20, 21, 26, 27, 28, 29
<u>New York Pathological and X-Ray</u> <u>Laboratories Inc. v. Immigration and</u> <u>Naturalization Service</u> , 523 F.2d 79 (2nd Cir., 1975)	33
<u>Owens v. Housing Authority of the</u> <u>City of Stamford</u> , 394 F. Supp. 1267 (D. Conn., 1975)	17, 22, 23, 26
<u>Review Committee v. Willey</u> , 275 F.2d 264 (8th Cir., 1960)	12
<u>Thorpe v. Housing Authority of the City</u> <u>of Durham</u> , 393 U.S. 268 (1968)	13, 14, 17
<u>Udall v. Tallman</u> , 380 U.S. 1 (1964)	11, 12
Statutes Cited:	
5 USC §553	15
42 USC §1401	1, 2
42 USC §1408	5, 13
42 USC §1437	20, 32
42 USC §1437a(1)	5, 20, 23, 32

	Page
42 USC §1437a(6)	5
42 USC §1437c	5, 13
42 USC §1437d	5, 13
42 USC §1437d(c)(4)(B)	3, 16, 19
42 USC §3535(d)	5, 13
42 USC §1983	2
§8-38 Conn. Gen. Stat.	30
§8-40 Conn. Gen. Stat.	5
§47a-4(c) Conn. Gen. Stat.	24
§47a-7(a) Conn. Gen. Stat.	24
§47a-14 Conn. Gen. Stat.	24
§47a-15b Conn. Gen. Stat.	18
§47a-23 Conn. Gen. Stat.	9, 10
§47a-26 Conn. Gen. Stat.	10, 36
§47a-35 Conn. Gen. Stat.	11, 35
Connecticut Public Act 76-95	21
Regulations and Circulars Cited:	
24 CFR §866.1	1, 8, 11
24 CFR §866.2	8
24 CFR §866.4(1)	1
24 CFR §866.4(1)(2)	3, 16
24 CFR §866.4(1)(2)(i)	8

	Page
24 CFR §866.4(1)(3)	3, 8
24 CFR §866.50	8
24 CFR §866.55(e)	9, 16, 35
24 CFR §866.58	9
40 FR 33402	7
HUD Circular RHM 7465.8 (February 22, 1971)	5, 6, 14
HUD Circular RHM 7465.9 (February 22, 1971)	5, 7, 14
Other Authorities Cited:	
§80 Conn. Practice Book, 1975	10
§867A Conn. Practice Book, 1975	10, 11

THE ISSUES PRESENTED FOR REVIEW

First: Did the District Court abuse its discretion in granting the tenant plaintiffs' motion for a preliminary injunction enjoining the defendant Housing Authority of the City of Hartford from instituting or proceeding with evictions in state court until tenants were afforded notice and opportunity to be heard as required by regulations of the United States Department of Housing and Urban Development set forth at 24 C.F.R. §866.1 et seq. and particularly at 24 C.F.R. §866.4(1)?

Second: Are the regulations of the United States Department of Housing and Urban Development concerning lease provisions and grievance procedures set forth at 24 C.F.R. §866.1 et seq., particularly the regulations concerning procedural safeguards for tenants in the event of termination of lease for alleged non-payment of rent set forth at 24 C.F.R. §866.4(1), reasonable, consistent with the United States Housing Act of 1937, as amended, 42 U.S.C. §1401 et seq., and valid?

Third: Does the refusal by the defendant Housing Authority of the City of Hartford to comply with said regulations promulgated by the United States Department of Housing and Urban Development at 24 C.F.R. §866.4(1) violate plaintiff tenants' rights under the United States Housing Act of 1937, as amended, 42 U.S.C. §1401 et seq. and regulations pursuant thereto?

Fourth: Does the refusal by the defendant Housing Authority of the City of Hartford to provide tenants with written notice and an opportunity to be heard prior to termination of lease for alleged non-payment of rent violate the plaintiff tenants' right to due process under the Fourteenth Amendment to the United States Constitution?

PRELIMINARY STATEMENT

The Preliminary Injunction under review was granted by Honorable T. Emmet Clarie, Chief Judge, United States District Court, District of Connecticut.

STATEMENT OF THE CASE

The plaintiff tenants, residents of federally assisted low income housing projects operated by the defendant Housing Authority of the City of Hartford (hereinafter HHA), filed a complaint in the District Court claiming that the failure of the HHA to provide mandated written notice concerning the reason for the termination, access to the HHA grievance procedure and opportunity to be heard prior to termination of their leases for alleged non-payment of rent violated the tenants' rights under the Housing Act of 1937, as amended, 42 U.S.C. §1401 et seq.; the Civil Rights Act of 1871, 42 U.S.C. §1983; and the due process clause of the Fourteenth Amendment of the United States Constitution. Joint Appendix (hereinafter JA) p. 3.

The tenants sought injunctive and declaratory relief to require the HHA to implement leases providing for written notice and an opportunity to be heard prior to proposed termination of lease for alleged non-payment of rent. JA p. 3. Such lease provisions are mandated for housing authorities by regulations of the U.S. Department of Housing and Urban Development (hereinafter HUD). 24 C.F.R. §866.4(1)(2); §866.4(1)(3).

The Secretary of HUD is also named as a defendant due to her failure to require the HHA to implement said regulations. JA p. 3.

The District Court ordered the defendants to show cause why a preliminary injunction, enjoining the HHA from taking any action to evict the tenants until the HHA had complied with the HUD regulations concerning lease and grievance procedures, should not issue on the tenants' complaint.

On the date of the show cause hearing, December 27, 1976, the defendant HHA answered the complaint, admitting the tenants' factual allegations. JA p. 33. The HHA also presented special defenses alleging that the HUD regulations in question violated the United States Housing Act, as amended. 42 U.S.C. §1437d(c)(4)(B). JA p.33. The defendant HHA also cross-complained against HUD. JA p. 38. Subsequent to the HHA's taking of this appeal, HUD answered the complaint and cross-complaint and HUD cross-complained against the HHA.

The District Court, after the evidentiary show cause hearing and submission of briefs, granted the plaintiff tenants' motion for

a preliminary injunction ruling that the HUD regulat. in question were within HUD's authority to promulgate, finding that the HHA had refused to implement the HUD regulations which prescribed procedural safeguards for the plaintiff tenants, and recognizing that tenancy in public housing is a valuable property interest protected by the Constitution. JA p. 42. The order granting the preliminary injunction enjoins the HHA from proceeding to evict the plaintiff tenants in state actions and from instituting eviction actions for alleged non-payment of rent against other tenants in federally assisted projects without first affording them the notice required by the HUD regulations in question. JA p. 47.

The defendant HHA has appealed from the ruling and order of the District Court.

To date the District Court has not ruled on the plaintiffs' motion to determine propriety of a class action, which is opposed by the defendant HHA.

STATEMENT OF FACTS

The plaintiff tenants are residents of federally assisted low income housing projects operated by the defendant HHA. JA p. 3. They live in these housing projects under written leases which provide for automatic renewal for successive terms of one month each. JA p. 3.

The defendant HHA is a public housing agency within the

meaning of the United States Housing Act of 1937, as amended. 42 U.S.C. §1437a(6), see also Conn. Gen. Stat. §8-40. The principal source of federal financial assistance to HHA is through the U.S. Department of Housing and Urban Development. The financial assistance received by HHA is conditioned by its annual contributions contract with HUD and by regulations promulgated by the Secretary of HUD to carry out the purposes of the United States Housing Act. The Secretary has authority to issue, amend and rescind such regulations pursuant to 42 U.S.C. §1408. See 42 U.S.C. §§1437c; 1437d; 3535(d).

The tenants' rent is limited to twenty-five percent of net family income as defined by Congress and HUD in regulations promulgated under 42 U.S.C. §1437a (1).

Secretaries of HUD have exercised their rule making powers by issuing circulars and regulations requiring that housing authorities provide certain procedural rights to tenants. Specifically, Secretaries of HUD have issued rules, regulations and circulars requiring that housing authorities implement certain mandatory provisions in leases with tenants and that they adopt certain mandatory grievance procedures for tenants. See HUD Circulars RHM 7465.8 and 7465.9 (February 22, 1971). These circulars are the predecessors of the regulations at issue in this case and contain substantially similar provisions.

Paragraph 3a of HUD Circular RHM 7465.8 provides that Part II, §203(B) of Annual Contributions Contracts between housing authorities and HUD requires that housing authorities must provide their tenants with leases which shall not be terminated other than for good cause. This same paragraph provides "(i)n terminating a tenancy, the Local Authority shall inform the tenant in a private conference or other appropriate manner the reasons for the eviction and give the tenant an opportunity to make such reply or explanation as he may wish." This provision does not set forth any exception for non-payment of rent to this mandatory first step in terminating a tenancy.

Moreover, Paragraph 3c of HUD Circular RHM 7465.8, referring back to Paragraph 3a provides "no lease shall contain language which establishes less than the minimum responsibilities and obligations on each of the parties as provided in the model lease shown in Appendix 1, with respect to the above required provisions." The mandatory nature of the provisions of Paragraph 3 is further emphasized in Paragraph 6 of the same Circular which provides that each lease must include "provisions which establish no less than the minimum responsibilities and obligations on each of the parties provided in the model lease attached as required by Paragraph 3 above."

Appendix 1 of said Circular sets forth a model lease. Section 10 of this model lease provides that the housing authority may terminate the lease for good cause by giving written notice of not

less than thirty days prior to termination. Moreover, §10 provided that if the housing authority decided to terminate the lease it had to provide the tenant with a conference to tell him the reason(s) for the eviction and to make such reply or explanation as he may wish. Also, the tenant was to be told at this conference of his right to a hearing on the proposed eviction. Again there is no provision which allows housing authorities to exclude certain tenants from the mandatory administrative procedures to be implemented in the event that management should elect to terminate a tenancy.

HUD Circular RHM 7465.9 requires that housing authorities incorporate a grievance procedure with prescribed safeguards. Section 8 of the model grievance procedure reiterates the conference procedure discussed, supra. Moreover, it requires that if the tenant requests a hearing, a notice to vacate could not be served until a hearing panel decision upholding the proposed eviction is sent to the tenant. No exceptions to the requirements for notice to the tenant or the right of the tenant to be heard are set forth in this section.

On August 7, 1975 the Secretary of HUD, in accordance with the Administrative Procedure Act, promulgated new regulations concerning lease and grievance procedures to be adopted by housing authorities with respect to their low income tenants and caused them to be published that day. 40 FR 33402. Said regulations are now

set forth at 24 C.F.R. 866.1 et seq. and 866.50 et seq. Housing authorities, including the HHA, were required to adopt the lease provisions within six months and to implement them thereafter.

24 C.F.R. §866.2.

The regulations concerning lease provisions include a requirement that the lease must include a provision whereby a tenant must be given fourteen days written notice of termination of lease in the case of failure to pay rent. 24 C.F.R. §866.4(1)(2)(i). The regulations further provide that the notice of termination to the tenant shall state the reasons for the termination, shall inform the tenant of his right to make a reply and to request a hearing in accordance with the housing authority's grievance procedure. 24 C.F.R. 866.4(1)(3). In addition, the regulations provide that tenants are to be provided with a grievance procedure in order to dispute housing authority action or failure to act involving the tenant's lease or housing authority regulations which adversely affect the tenant's rights, duties, welfare or status. 24 C.F.R. §866.50 et seq.

The regulations further provide that in the event a tenant requests a grievance hearing that the "PHA shall not commence an eviction action in state or local court until it has served a notice to vacate on the tenant, and in no event shall the notice to vacate be issued prior to the decision of the hearing officer or the hearing panel having been mailed or delivered to the complainant." 24

C.F.R. §866.58. However, in the event that a tenant requests a grievance hearing, in a dispute involving rent, the HUD regulations provide housing authorities with significant protection of their financial interest in payment of rent by tenants. That is, the housing authority has the right to require payment of the disputed rent into an escrow account or the housing authority may terminate the grievance procedure. 24 C.F.R. §866.55(e).

The HHA did not adopt or implement the lease provision concerning the fourteen day notice prior to termination of lease required by HUD regulation. JA p. 33. Moreover, the HHA's lease specifically provides that tenants who allegedly have not paid rent are not provided the same administrative pretermination notice and access to the grievance procedure that tenants whose leases the housing authority proposes to terminate for other reasons receive. JA p. 52.

Under the HHA lease rent is due on the first of each month and deemed to be in default if not paid by the tenth of the month. JA p. 51. In the event that the HHA alleges that a tenant has not paid rent by the tenth of the month, the next step the HHA takes is the service of a notice to quit possession which is a prerequisite to bringing an eviction or summary process action in state court. §47a-23 Conn. Gen. Stat. The legal effect of the notice to quit possession is that its service upon the tenant terminates the lease. Borst vs. Ruff, 137 Conn. 359, 77 A.2d 343 (1951). In a case of alleged

non-payment the notice to quit gives that tenant five days in which to vacate the premises . §47a-23 Conn. Gen. Stat.

In the event that the tenant remains in possession of the dwelling unit after the expiration of the five day period set forth in the notice to quit possession, counsel for the HHA initiates the summary process action by issuing a writ, summons and complaint returnable to court six days after service upon the tenant. §47-23 Conn. Gen. Stat.

The tenant has two days within which to appear in the action to defend the action. §47a-26 Conn. Gen. Stat. In the event that the tenant does not appear, upon motion by the HHA, the court enters a default judgment against the tenant and in favor of the HHA for possession of the premises. §47a-26 Conn. Gen. Stat. Although a copy of the HHA's motion for default must be sent to the tenant in accordance with §80 of the Connecticut Practice Book, the motion is not calendared and there is no court hearing on the matter. §47a-26 Conn. Gen. Stat.; §867 A, Conn. Practice Book.

In the event that the tenant appears, but does not file a written pleading upon motion by the HHA, the court enters a default judgment against the tenant and in favor of the HHA for possession of the premises. §47a-26 Conn. Gen. Stat. Although a copy of the HHA's motion for default must be sent to the tenant in accordance with §80 of the Connecticut Practice Book, the motion is not calendared and there is no court hearing on the motion. §47a-26 Conn.

Gen. Stat.; 867 A, Connecticut Practice Book.

After judgment, following a five day stay of execution within which the tenant may appeal, the HHA may have the sheriff remove the tenant and his possessions from the premises. §47a-35 Conn. Gen. Stat.

The plaintiff tenants each had their leases terminated by the HHA for alleged non-payment of rent. JA p. 50. Their leases were terminated without the notice and access to the grievance procedure specified by the HUD regulations in question. JA p. 75. When neither tenant vacated by the expiration dates set forth in their respective notices to quit possession, the HHA instituted summary process proceedings in state court. JA p. 57. A default judgment for failure to appear was entered against Ms. King on November 10, 1976. JA p. 57. Ms. Avery appeared by counsel and the state court action did not go forward due to the institution of this case in District Court. JA p. 57.

ARGUMENT

The Defendant HHA's Violation of HUD Regulations Concerning Lease Provisions and Grievance Procedures, Set Forth at 24 C.F.R. §866.1 et seq., Which Regulations Are Reasonable, Consistent With the United States Housing Act of 1937, As Amended, And Thus Valid, Violate The Plaintiffs' Rights Under Said Housing Act.

An examination of the validity of the applicable HUD regulations must be done by applying the long established principles concerning review of administrative regulations. In Udall v. Tallman,

380 U.S. 1, 16 (1964) the Supreme Court stated "When faced with the problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. ...When the construction of an administrative regulation rather than a statute is at issue, deference is even more clearly in order." 380 U.S. 1, 16 (1964).

In addition, the then Circuit Judge Blackman summarized the principles of review in Review Committee vs. Willey, 275 F.2d 264, 272 (8th Cir. 1960). "It is well settled, of course, that administrative construction of an Act is entitled to great weight. Federal Trade Commission vs. Mandel Bros. Inc., 359 U.S. 385; Federal Housing Administration vs. Darlington, Inc., 358 U.S. 84.Regulations are to be sustained unless unreasonable and plainly inconsistent with the statute and they are not to be overruled except for weighty reasons. Commissioner of Internal Revenue vs. South Texas Lumber Co. 333 U.S. 496, 501. Fawcus Machine Co. vs. United States, 282 U.S. 375.One claiming that a regulation is invalid has the heavy burden to make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress. Boske vs. Comingore, 177 U.S. 459, 470; Gardner vs. United States, (5th Cir.) 239 F.2d 234, 237...."

Historically, HUD and its predecessor agencies, the Public Housing Authority and the United States Housing Authority have man-

dated requirements and promulgated implementing regulations with respect to the operations of low rent public housing projects pursuant to their general rule making authority, §8 of the U.S. Housing Act, as amended. 42 U.S.C. §1408. That section provides that "[t]he Authority may from time to time make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter." In addition, §7(d) of the Departmental Act vests in the Secretary the authority to "make such rules and regulations as may be necessary to carry out his functions, powers and duties." 42 U.S.C. 3535(d). Additional sources of rule making authority are set forth in §§5(b) and 6(c) of the U.S. Housing Act, as amended, 42 U.S.C. 1437c and 1437 d.

In Thorpe vs. Housing Authority of the City of Durham, 393 U.S. 268 (1968), the Supreme Court held that a 1967 HUD Circular requiring notice of termination of a tenancy and an opportunity for reply was a lawful exercise of HUD's rulemaking power and mandatory upon the housing authority, as a supplement to the annual contributions contract. The Supreme Court stated, at 279, that "[a]lthough the circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, that obligation is imposed under HUD's wholly independent rulemaking power."

The Supreme Court went on to determine that the circular was reasonably related to the purposes of the enabling legislation stating

that "one of the specific purposes of the federal housing acts is to provide 'a decent home and a suitable living environment for every American family' that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal." Thorpe, supra, at 281.

In 1971 HUD subsequently issued HUD Circulars RHM 7465.8 and 7465.9 mandating lease provisions and grievance procedures, discussed supra. The validity of these circulars was upheld after extensive litigation. In Brown vs. Housing Authority of the City of Milwaukee, 471 F. 2d 63, 66 (7th Cir. 1972) the Court upheld the circulars as being within the scope of the enabling legislation. They found "(t)he HUD circular promotes the policies outlined in the federal housing act and the contributions contract in two ways. First, as the Supreme Court noted in Thorpe, supra, a procedure designed to protect a tenant's right to continued tenancy clearly furthers the goal of providing a decent home to Americans who lack the financial means to otherwise live in a suitable living environment. Second, the hearing procedure is reasonably related to the protection of HUD's financial contribution to the project. This relationship is noted in the background paragraph of RHM 7465.9, which states:

'In recent years, it has become more and more apparent that many of the problems faced by management and tenants in low-rent public housing have resulted in friction and strain in tenant-management relations and in litigation, costly to both management and tenants; much of which might have been avoided had some kind of procedure been available for grievances to be aired before an impartial individual or panel'."

In accord, see also Housing Authority of the City of Omaha vs. United States, 468 F.2d 1 (8th Cir. 1972); Chicago Housing Authority vs. Harris, 49 Ill. 2d 274, 275 N.E. 2d 353 (1971).

It should be noted that the Circulars were upheld in spite of the fact that they were not published in the Federal Register as required by the Administrative Procedure Act. Brown vs. Housing Authority of the City of Milwaukee, supra at 65.

The regulations at issue in the case at hand are basically similar to the 1971 Circulars. They were, however, promulgated in full compliance with the Administrative Procedure Act, 5 U.S.C. §553 et seq. The principal difference is that the regulations establish definite, uniform time periods which local housing authorities are required to abide by in processing evictions. The regulations require that a pre-termination notice be sent to the tenant. The notice is fourteen days in the case of failure to pay rent, a reasonable time in case of urgent circumstances creating a risk of

health or safety and of 30 days in all other cases. 24 C.F.R. 866.4(1)(2).

The Defendant HHA argues that compliance with the regulations will impede their rent collection/eviction procedure. The HHA then argues that since their eviction procedure will be delayed, the regulations are not binding because they are inconsistent with Congressional requirements pertaining to "the establishment of satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of non-payment of rent...." 42 U.S.C. §1437d(c)(4)(B).

It is evident on the face of the regulations, however, that HUD was cognizant of the problems caused by non-payment of rent and promulgated regulations that will allow for "prompt" processing of evictions. The regulations allow for a pre-termination notice of fourteen days in the event of failure to pay rent, but require the notice to be thirty days in all other cases (except in exigent circumstances when a reasonable time is sufficient). 24 C.F.R. §866.4(1)(2). The regulations further authorize the housing authority to require an escrow deposit in the event that the tenant requests a grievance hearing to contest the basis of the decision to terminate. 24 C.F.R. §866.55(e). Failure to make the escrow deposit as required results in the immediate termination of the grievance procedure. 24 C.F.R. §866.55(e).

Thus it is evident that the regulations evidence concern for the problems of non-payment of rent and allow for promptness in the processing of evictions. The regulations reflect a balance between guarantees that tenants will receive due process protections with concern for prompt payment of rent. Litigation under prior HUD circulars has established that lease termination procedures are a proper concern for HUD. Thorpe vs. Housing Authority of the City of Durham, supra; Brown vs. Housing Authority of the City of Milwaukee, supra. Furthermore, it has been held that tenants of a public housing authority are entitled to such a procedure before their leases are terminated as a matter of due process of law. Escalera vs. New York City Housing Authority, 425 F.2d 853 (2nd Cir.), cert. denied, 400 U.S. 853 (1970); Owens vs. Housing Authority of the City of Stamford, 394 F. Supp. 1267, (D. Conn. 1975), discussed infra.

The Defendant HHA argues that since the regulations would serve to delay their eviction procedure, the regulations are invalid. It should be pointed out, however, that the defendant's eviction procedure in effect at the time this action was brought (which did not provide for a notice/hearing as required by both the HUD Circulars and the federal regulations) did not evict tenants for non-payment as promptly as possible. Both the standard lease of the Defendant HHA, JA p. 51, 52, and state law allow for a ten day grace period in the

event of failure to pay rent. Conn. Gen. Stat. 47a-15b. The actual day of the month on which the Defendant HHA would terminate a lease for non-payment of rent, however, fell as late as the nineteenth day of the month. JA p. 53. Therefore, if the defendant had sent the fourteen day pre-termination notice on the eleventh of the month, the defendant would have been able to terminate the lease on the twenty-fifth of the month, in full compliance with the federal regulations. This would delay the eviction procedure of the Defendant HHA only six days, not the full fourteen days allowed for in the federal regulation.

In summary, the applicable HUD regulations allow for prompt collection of rent and processing of evictions, while ensuring that proper lease termination procedures are followed by local housing authorities. Similar regulations have been upheld after extensive litigation. The regulations are presumptively valid; that presumption of validity has not been overcome.

The Defendant HHA admits their deliberate failure to provide the named plaintiffs with notice and hearing procedures required by valid HUD regulations. JA p. 33.

Although the Defendant HHA argues that the regulations are inconsistent with that provision of the United States Housing Act of 1937, as amended, with respect to prompt payment and collection of rents and the prompt processing of evictions in the case of non-

payment of rent, 42 U.S.C. §1437d(c)(4)(B), the regulations are consistent with the Act and valid, as discussed, supra. Accordingly, the Defendant HHA has violated the plaintiffs' rights under both the regulations and the Act.

The Defendant HHA's Prosecution of Eviction Actions To Recover Possession of the Plaintiff Tenants' Premises Without Providing The Plaintiffs With Administrative Notice And An Opportunity To Be Heard Prior To Termination of Lease For Alleged Non-Payment of Rent Violates The Plaintiffs' Right to Due Process.

Tenancy in federally subsidized low income public housing is a right subject to the procedural protections of due process.

Escalera vs. New York City Housing Authority, 425 F. 2d 853 (2nd Cir., 1970).

The specific dictates of the due process clause to the Fourteenth Amendment to the United States Constitution depend on what each particular situation demands. Mathews vs. Eldridge, ____ U.S. ___, 96 S. Ct. 893, 902 (1976). In Eldridge a case involving the termination of Social Security disability benefits, the Supreme Court described the proper test for determining due process requirements as "(f)irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function in-

volved and the fiscal and administrative burden that the additional or substituted procedural requirements would entail." Eldridge, supra, at 903.

A consideration of each facet of the Eldridge test proves that due process of law requires that tenants in federally assisted low rent public housing be provided with adequate notice and an opportunity to be heard prior to termination of the tenancy and possible eviction.

The plaintiffs' private interest that may be affected by government action is their tenancy in public housing. By definition this housing is safe, decent and sanitary housing which such low income families would be otherwise unable to afford. 42 U.S.C. §1437. There is no comparable alternative housing at comparable rents in the Hartford area. JA p. 63. Tenants' rent is limited to twenty-five percent of net income. 42 U.S.C. §1437a(1).

There is a very long waiting list for admission to low income federally assisted public housing (JA p. 65) and there is a very low average vacancy in the projects. JA p. 64. Accordingly, if the plaintiff tenants were evicted from their apartments and were to reapply for admission they would experience a substantial wait before they were readmitted even if their applications were treated in the same manner as those of all other applicants. However, under HHA policies such evicted tenants would have a much longer wait as compared to other applicants. JA p. 66.

The tenants' case is clearly distinguishable from the case in Eldridge where eligibility for disability benefits was not based on financial need. Eldridge, supra, at 905. The plaintiffs' situation in terms of financial need is analogous to the possible termination of welfare benefits at stake in Goldberg vs. Kelly, 397 U.S. 254, 264; (1970).

"As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision making process." Eldridge, supra, at 906. In Eldridge the court pointed out that following termination of disability benefits other forms of public assistance were possible if necessary. Eldridge, supra, at 906. This is not the case with the low income plaintiffs who would be deprived of shelter, a necessity of life, at a rent they can afford.

The second part of the Eldridge test requires an examination of the risk of erroneous deprivation of interest through procedures used, and the probable value of additional or substitute procedural safeguards. Eldridge, supra at 903.

In a careful analysis of Connecticut state court summary process proceedings, which proceedings have not been significantly changed by Connecticut Public Act 76-95, District Court Judge Robert Zampano has found such proceedings "too summary" as applied

to public housing tenants. Owens vs. Housing Authority of the City of Stamford, supra at 1273. It must be noted that the fact that the plaintiffs are tenants in federally assisted public housing is what clearly distinguishes this case from Lindsey vs. Normet, where due process in the eviction of a tenant by a private landlord from private housing was discussed. 405 U.S. 56 (1972).

"The government cannot deprive a private citizen of his continued tenancy, without affording him adequate procedural safeguards even if public housing could be deemed to be a privilege."

Escalera vs. New York City Housing Authority, supra, at 861.

Escalera closely follows the reasoning of the United States Supreme Court in Goldberg, supra, in its view that tenancy in federally assisted public housing is in the nature of a welfare entitlement requiring due process prior to the termination of tenancy.

In Owens the Defendant Housing Authority argued that public housing tenants were not entitled to administrative hearings prior to termination of tenancy or eviction because the tenants had an opportunity to litigate the issue of non-payment of rent in State court. Owens, supra, at 1273. However, the District Court found that "Connecticut's summary process procedures do not provide tenants with a full opportunity to litigate against their landlords." Owens, supra, at 1273.

However, even if a complete judicial hearing were guaranteed to public housing tenants under the Connecticut summary process

statutes, in order to ensure a fair decision by a housing authority in determining to terminate a tenant's lease for alleged non-payment of rent the tenants must be provided with notice and an opportunity to be heard prior to that decision. The court in Owens, supra, at 1273, found "that (e)ven assuming, however, that a plenary judicial hearing were available in state summary process, pre-eviction administrative hearings would nevertheless be required. . . . the fact that the SHA can enforce its decisions by recourse to the state summary process procedures is not an adequate substitute for 'fair procedures in the decision of the HA in the first instance'. Escalera, supra, 425 F.2d at 866." Owens, supra, at 1273.

The facts of the instant case are analogous to a situation discussed by the court in Escalera, the assessment of "additional rent" charges. Escalera, supra, at 860. A principle reason for the analogy is the fact that the tenant plaintiffs' rent is computed at twenty-five per cent of net family income. 42 U.S.C. 1437 a(1). For example, in the case where the tenant is solely dependent upon public assistance for family income, a delayed, stolen or lost welfare check means no family income, through no fault of the tenant, until the welfare bureaucracy corrects the problem. Although in such a situation there is a serious question concerning the amount of rent due until the check arrives, the HHA auto-

matically terminates the lease.

Another assessment of rent situation analogous to the Escalera case is the instance where a tenant seeks to withhold rent or deduct from rent because the HHA has not provided certain essential services. See §§47a-4(c); 47a-7(a); 47a-14 Conn. Gen. Stat. Again the HHA would automatically terminate the lease and start court proceedings.

The HHA argues that tenants involved in such situations are not as deserving of administrative notice and opportunity to be heard as are tenants they propose to evict for other reasons. However, Judge Smith wrote "(n)or is it persuasive. . . to argue that a tenant may challenge the additional rent charges by refusing to pay them and by defending in court against the HA's suit for non-payment of rent. The cost of defending in court and the hazards envisioned by a public housing tenant in refusing to pay rent, would probably dissuade all but the boldest tenant from contesting an 'additional rent' charge in this manner." Escalera, supra, at 864.

Moreover, the HHA's procedures cause a low income tenant to go into court and defend an action or to enter into a stipulation in which the tenant must pay any rent owed plus the HHA's legal and other costs. JA p. 67. "(E)ven small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level." Escalera, supra, at 864.

For all of these reasons the holdings of Escalera are also applicable in this case. "Subjective" facts may be in dispute in an alleged non-payment of rent case, just as in any other case.

The court in Escalera mandated that "(t)he tenant should be notified in advance of the complete grounds for the proposed action; should have access to all the information upon which any decision will be based, and should be afforded the right to confront and cross-examine witnesses in appropriate circumstances. In addition, it would seem that the tenant should be afforded the opportunity to present his side of the case in the presence of an impartial official. . ." (cite omitted). Escalera, supra, at 863.

Moreover, the United States Court of Appeals for the Fourth Circuit has also followed the reasoning of Goldberg and Escalera in terms of the application of due process to public housing tenants prior to termination of lease. Caulder vs. Durham Housing Authority, 433 F.2d 998 (4th Cir , 1970): The court in Caulder decided that "(t)he privilege or the right to occupy publicly subsidized low rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of Goldberg or the other rights and privileges referred to in Goldberg." Caulder, supra, at 1003.

The Caulder court held that prior to making the decision to evict a tenant from federally subsidized housing, due process requires that the housing authority provide the tenant with

"(1) timely and adequate notice detailing the reasons for the proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel..., (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker." Caulder, supra, at 1004.

It is in this context of legal precedent requiring due process notice and opportunity to be heard and of deficiencies in the Connecticut summary process law that the second Eldridge test, consideration of the risk of erroneous deprivation of interest through procedures used and the probable value of additional or substitute procedural safeguards, must be viewed. The Owens court found that "Connecticut's summary process procedures do not provide Housing Authority tenants with a full opportunity to litigate against their landlord," noting the frequent failure of Connecticut state courts to consider federal constitutional defenses in non-payment of rent cases. Owens, supra, at 1273. Accordingly, the "too summary" eviction proceedings as applied to residents of federally assisted low income housing involve a serious risk of erroneous deprivation of a tenant's interest in continued occupancy through the procedure used by the HHA, termination of lease and institution of legal proceedings without prior notice and oppor-

tunity to be heard.

The court must also evaluate the "probable value, if any, of additional or substitute procedural safeguards." Eldridge, supra, at 903. The plaintiff tenants contend that the additional procedural safeguard of notice and opportunity to be heard prior to termination of lease is invaluable.

The Eldridge court pointed out that the decision to terminate disability benefits generally depends upon "routine, standard, and unbiased medical reports by physician specialists" as compared to the Goldberg situation where "issues of witness credibility and veracity often are critical to the decision-making process." Eldridge, supra, at 907. The type of information and evidence necessary in a contested case of alleged non-payment of rent is more closely akin to the Goldberg situation inasmuch as different types of information would be necessary and witness credibility would often be the key to the tenant's defense.

The procedure to terminate disability benefits is a multi-step scheme devised to protect the rights of recipients and the government. Eldridge, supra, at 903-905. It is understandable that the Supreme Court held that this elaborate administrative procedure did not need an additional layer of procedural safeguards, particularly given the low risk of error. Accordingly, there can be no meaningful comparison to the Connecticut summary process procedure, given the practical deficiencies in the proceedings as well as the

nature of the evidence and information involved.

Accordingly, a balancing of the need of housing authorities to take action against allegedly delinquent tenants and the need of tenants to be heard at a meaningful time, will tip in favor of administrative notice and hearing.

The third Eldridge test in determining what type of due process is required in a particular situation requires a consideration of "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Eldridge, supra, at 903. The court in Eldridge found that "(f)inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed." Eldridge, supra, at 909.

However, the facts of the case under review are distinguishable from the facts of Eldridge where "the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final." Eldridge, supra, at 909-910. As discussed above, there are no

administrative procedures prior to termination of a tenant's lease where non-payment of rent is alleged.

The HHA lease provides for notice and an opportunity to be heard prior to termination of a tenant's lease for reasons other than non-payment of rent. JA p. 51. Accordingly, the HHA already has personnel and procedures to provide tenants with notices and hearings. Therefore, if the HHA were to provide tenants in the case of alleged non-payment with notice and hearing, they would merely be extending this procedure to a class of tenants that formerly had been denied this procedural safeguard.

In Goldberg the court found a State interest as well as an individual interest in preventing the erroneous termination of welfare benefits which outweighed the State's fiscal and administrative interest in expedited terminations. Goldberg, supra, at 266. There is an analogous State interest as well as an individual interest in preventing the erroneous termination of a public housing lease which outweighs the possible competing HHA financial interest in expedited terminations.

The federally assisted low income public housing program was established to accomplish a number of State interests. Caulder, supra, at 1003. In Connecticut these purposes include housing low income families in safe, sanitary and affordable accommodations, alleviating a housing shortage, alleviating overcrowding and congestion in housing, preventing an increase in disease and crime,

protecting the health, safety, morals and welfare of State residents, protecting property values, and cutting down on expenditures of public funds for public services including crime prevention and punishment, public health and safety, and fire and accident protection. §8-38 Conn. Gen. Stat.

Therefore, there would be a detrimental impact in terms of the State interest if a tenant were wrongfully deprived of safe, sanitary affordable public housing. Moreover, the wrong could not be subsequently righted immediately because of the HHA's long waiting list (JA p. 65) and policies to delay readmission of evicted tenants (JA p. 66).

Accordingly, the administrative notice and pretermination hearing sought by plaintiffs comply with the threefold test set forth in Eldridge, supra. For this reason in order to provide the plaintiff tenants with minimal due process protections, the HHA must provide administrative notice and an opportunity to be heard prior to termination of tenancy for any reason, including non-payment of rent.

The District Court Did Not Abuse its Discretion in Granting the Preliminary Injunction.

A motion for a preliminary injunction is addressed to the discretion of the district court and its decision is not to be disturbed unless an abuse of discretion is shown. Brown and Williamson Tobacco Corp. vs. Engman, 527 F.2d 1115, 1121 (2nd Cir.,

1975).

In order to determine whether the district court abused its discretion in granting or denying a preliminary injunction the reviewing court must determine whether the plaintiffs have demonstrated a substantial likelihood of success on the merits coupled with the possibility of some irreparable injury to themselves or that plaintiffs have raised serious questions going to the merits and that the balance of hardships tips decidedly in plaintiffs' favor. Halder vs. Avis Rent-A-Car System, Inc., 541 F.2d 130, 131 (2nd Cir., 1976); Brown and Williamson Tobacco Corp. vs. Engman, supra, at 1121.

The District Court Ruling clearly establishes that the plaintiffs demonstrated a substantial likelihood of success on the merits. JA p. 42. The Court found that HUD is empowered to make rules and regulations for housing authorities to carry out the purposes of the United States Housing Act and that the contested regulation concerning the termination of tenants' leases was well within the purposes of the Housing Act and, thus, within HUD's authority to promulgate. JA p. 45. Moreover, although it was not necessary for the District Court to reach the issue of due process for the purpose of ruling on the preliminary injunction, the court also pointed out that even if there were not valid HUD regulations requiring notice and hearing prior to eviction "the trend of existing case law" indicates that eviction without administrative

notice and opportunity to be heard violates due process. JA p. 45.

The plaintiff tenants claim that eviction from federally assisted low income housing would constitute irreparable injury. By definition these tenants are low income persons unable to afford housing in the private market. 42 U.S.C. 1437. Their rents are calculated in accordance with their ability to pay and are limited to twenty-five percent of net income. 42 U.S.C. 1437a(1). There is no comparable housing at comparable low rents in the City of Hartford. JA p. 63. Moreover, the HHA has a very low typical vacancy rate of approximately two percent (JA p. 64) and there is a very substantial waiting list of eligible applicants for low income housing. JA p. 65.

In addition, although any family on the waiting list for low income housing faces a substantial wait before admission to public housing (JA p. 65), Daniel Lyons, Executive Director of the HHA, testified that any family evicted for non-payment of rent would have a much longer wait than other families on the list. JA p. 66.

It is obvious then from the HHA's own testimony that eviction from low income public housing would mean the loss of a substantial benefit to the plaintiff tenants. Moreover, if these tenants were wrongfully evicted from public housing, the wrong could not and would not be immediately righted due to the long waiting list and the aforesaid HHA policy. It clearly can be inferred from the District Court decision that the likelihood of irreparable harm

to the plaintiff tenants was found.

"Irreparable harm can be found where there is continuing wrong which cannot be adequately redressed by final relief on the merits. Such harm often resides where money damages cannot provide adequate compensation." New York Pathological and X-Ray Laboratories Inc. vs. Immigration and Naturalization Service, 523 F.2d 79, 81 (2nd Cir., 1975). If a tenant were wrongfully evicted from public housing under the circumstances of this case the injury would be irreparable because the injury is of the type that cannot be adequately redressed by final relief on the merits, particularly because money damages could not compensate for the loss suffered.

The tenant plaintiffs have filed a motion to determine the propriety of a class action in order to protect other tenants from the same type of irreparable injury. To date this motion is pending before the District Court. Although the order granting the preliminary injunction protects tenants other than the two named plaintiffs, this order was prepared by counsel for the HHA and agreed to by counsel for the tenants before it was signed by Judge Clarie. Until the class certification motion is decided, such an order is the only method by which both tenants can be protected and judicial economy can be maintained.

In addition, the tenant plaintiffs have also met the alternative test concerning a preliminary injunction inasmuch as they have raised serious questions going to the merits and the balance

of hardships tips decidedly in their favor. Halder vs. Avis Rent-A-Car System, Inc., supra, at 1121.

A reading of the District Court's Ruling (JA p. 42) indicates that Judge Clarie found that the tenant plaintiffs had raised serious legal questions going to the merits including the authority of HUD to issue such regulations, the applicability of the contested HUD regulation to the HHA's eviction procedures, and the issue of due process in the eviction of public housing tenants. JA p. 45.

Moreover, in balancing the hardships between the low income tenants whose leaseholds were jeopardized without administrative notice or opportunity to be heard and the HHA which alleged economic hardship, the ruling makes clear that the Court duly considered the HHA's financial hardship argument. JA p. 44.

There is no finding of fact which establishes any correlation between expedited eviction and collection of rent. Moreover, although under the terms of the standard HHA lease, the tenant is deemed to be in default if rent is not paid by the tenth of the month (JA p. 51). the HHA does not act to terminate leases in cases of alleged non-payment until the twelfth to the nineteenth of the month. JA p. 53. Therefore, if the HHA were to promptly serve fourteen day notices, as required by the HUD regulations in question, on the eleventh of the month in cases which were not satisfactorily resolved under the grievance procedure, they would

be able to terminate a lease by notice to quit as early as the twenty-fifth of the month. Inasmuch as the HHA on its own schedule terminates leases as late as the nineteenth of the month (JA p. 53), the difference may be a mere six days.

In Goldberg, supra, at 266, the Supreme Court discounted the State's argument of fiscal hardship by pointing out that "(m)uch of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pretermination hearings and by skillful use of personnel and facilities." That same reasoning is applicable to the case at hand.

Finally, any balancing of hardships must take into consideration the safeguards which the HHA has at its disposal. The same HUD regulations which require that procedural safeguards be afforded to tenants also enable the HHA to fully protect its financial interests by requiring that any disputed rent be placed in an escrow account pending a decision through the grievance procedure and the HHA has the option of terminating the grievance procedure if this payment is not made. 24 C.F.R. §866.55(e).

Also, once the matter is brought into State court, the HHA can obtain a default judgment against a non-appearing tenant and execute on said judgment five days thereafter, excluding Sundays and holidays. §§47a-35 Conn. Gen. Stat. If the tenant appears, the HHA may immediately make a motion requiring that the tenant pay use and occupancy for the premises until the case is decided.

§47a-26 Conn. Stat. In the event the tenant does not pay said monies into court the pleadings are ordered closed and a trial is scheduled expeditiously. §47a-26 Conn. Gen. Stat.

For all of these reasons the balance of hardships tips decidedly in favor of the plaintiff.

Therefore, both alternative tests used to review the District Court's issuance of a preliminary injunction have been satisfied.

CONCLUSION

For the reasons stated above, the order of the District Court granting a preliminary injunction should be upheld.

Respectfully submitted,

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